

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

MARCUS CAVANAUGH,

Plaintiff,

v.

Case No. 20-CV-108-JPS

M.D. DILIP K. TANNAN, R.N.  
SANDRA MCARDLE, and M.D.  
THOMAS W. GROSSMAN,

**ORDER**

Defendants.

Plaintiff Marcus Cavanaugh, a prisoner proceeding in this matter *pro se*, filed a complaint alleging that Defendants violated his constitutional rights. (Docket #1). This matter comes before the court on Plaintiff's petition to proceed without prepayment of the filing fee (*in forma pauperis*). (Docket #2). Plaintiff has been assessed and has paid an initial partial filing fee of \$26.65. 28 U.S.C. § 1915(b).

The court shall screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, 504 U.S. 25, 31 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997). The court may, therefore, dismiss a claim as frivolous where

it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. “Malicious,” although sometimes treated as a synonym for “frivolous,” “is more usefully construed as intended to harass.” *Lindell v. McCallum*, 352 F.3d 1107, 1109–10 (7th Cir. 2003) (citations omitted).

To state a cognizable claim under the federal notice pleading system, the plaintiff is required to provide a “short and plain statement of the claim showing that [he] is entitled to relief[.]” Fed. R. Civ. P. 8(a)(2). It is not necessary for the plaintiff to plead specific facts and his statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, a complaint that offers mere “labels and conclusions” or a “formulaic recitation of the elements of a cause of action will not do.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

To state a claim, a complaint must contain sufficient factual matter, accepted as true, “that is plausible on its face.” *Id.* (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The complaint’s allegations “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citation omitted).

In considering whether a complaint states a claim, courts should follow the principles set forth in *Twombly* by first, “identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. Legal conclusions must be

supported by factual allegations. *Id.* If there are well-pleaded factual allegations, the court must, second, “assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*

To state a claim for relief under 42 U.S.C. Section 1983, a plaintiff must allege that: 1) he was deprived of a right secured by the Constitution or laws of the United States; and 2) the deprivation was visited upon him by a person or persons acting under color of state law. *Buchanan-Moore v. City. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009) (citing *Kramer v. Vill. of N. Fond du Lac*, 384 F.3d 856, 861 (7th Cir. 2004)); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The court is obliged to give the plaintiff’s *pro se* allegations, “however inartfully pleaded,” a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

Plaintiff alleges that he hurt his knee in May 2016 while incarcerated at Oshkosh Correctional Institution (“OCI”). (Docket #1 at 2). He states that while at OCI, his primary caregiver was Defendant Dr. Dilip Tannan (“Tannan”). Plaintiff was initially given ibuprofen and ice to treat the knee. *Id.* Plaintiff continued to experience pain and so complained repeatedly to the health services unit. *Id.* In September 2016, Plaintiff was given a steroid shot. This helped the pain for a few months, but it eventually returned.

Plaintiff was given an MRI in December 2016. It showed that his knee was badly damaged. Plaintiff met with Defendant Dr. Thomas W. Grossman (“Grossman”), a specialist at Waupun Memorial Hospital, who recommend meniscus surgery. Grossman explained to Plaintiff that his knee issues stemmed from fluid buildup, which had been caused either by not receiving further treatment for the knee right after the injury, or from the steroid shot itself. Grossman wanted to do the meniscus surgery now

and felt that a knee replacement would be needed later. Grossman further stated that Plaintiff would start experiencing arthritis in the knee.

Plaintiff had the surgery and subsequently went through physical therapy. This helped the pain for a period of months. The pain had returned by the time Plaintiff was transferred to the Wisconsin Secure Program Facility (“WSPF”). Defendant Sandra McArdle (“McArdle”) was Plaintiff’s primary caregiver at that facility. Plaintiff claims that the pain got worse at WSPF, though he was only ever given pain medications and ice.

Plaintiff eventually went to see another (unnamed) off-site specialist. He confirmed that Plaintiff’s pain was due to arthritis. The specialist told Plaintiff that he was too young for a knee replacement. The only treatment options the specialist could offer were another steroid shot or ibuprofen and ice. Plaintiff refused the shot and so has continued on the regimen of pain medication and ice. Plaintiff complains that he still has knee pain to this day.

Plaintiff’s allegations invoke his rights under the Eighth Amendment, which secures an inmate’s right to medical care. Prison officials violate this right when they “display deliberate indifference to serious medical needs of prisoners.” *Greene v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005) (quotation omitted). Deliberate indifference claims contain both an objective and a subjective component: the inmate “must first establish that his medical condition is objectively, ‘sufficiently serious,’; and second, that prison officials acted with a ‘sufficiently culpable state of mind,’ – i.e., that they both knew of and disregarded an excessive risk to inmate health.” *Lewis v. McLean*, 864 F.3d 556, 562–63 (7th Cir. 2017) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal citations omitted)).

The concept of personal involvement is also important to Plaintiff's complaint. Section 1983 "creates a cause of action based on personal liability and predicated upon fault; thus liability does not attach unless the individual defendant caused or participated in a constitutional violation." *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996). Moreover, the doctrine of respondeat superior (supervisory liability) does not apply to actions filed under Section 1983. *See Pacelli v. deVito*, 972 F.2d 871, 877 (7th Cir. 1992). Section 1983 does not create collective or vicarious responsibility. *Id.*

With these rules in mind, the Court concludes that Plaintiff's complaint fails to state a valid claim for relief under the Eighth Amendment as to the named Defendants. Plaintiff offers no factual allegations regarding Tannan's involvement in his medical care, other than stating that Tannan was the primary caregiver. This is not enough to impose constitutional liability. The same is true for McArdle.

While Grossman is mentioned explicitly, another overarching problem exists for him and the other defendants. Plaintiff's complaint is, as currently pleaded, one for medical negligence in failing to appropriately treat his knee. Deliberate indifference, however, equates to intentional or reckless conduct, not mere negligence. *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010). It occurs only when a defendant realizes that a substantial risk of serious harm to the prisoner exists, and then disregards that risk. *Id.*

"Neither medical malpractice nor mere disagreement with a doctor's medical judgment is enough to prove deliberate indifference." *Id.* at 441. Further, "[a] medical professional is entitled to deference in treatment decisions unless no minimally competent professional would have so responded under those circumstances." *Sain v. Wood*, 512 F.3d 886, 894–95 (7th Cir. 2008) (quotation omitted). Rather, a medical professional is

deliberately indifferent only when his decisions are “such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment.” *Id.* at 895 (quotation omitted).

Plaintiff’s allegations come nowhere close to meeting this standard. Plaintiff received treatment at each institution, and from Grossman at the hospital; Plaintiff does not allege that he was ignored. Plaintiff has not explained how this treatment was so poor as to demonstrate a complete lack of medical judgment on the part of the Defendants. Rather, Plaintiff merely disagrees with the course of treatment they prescribed. This is a state law negligence claim, not an Eighth Amendment claim. *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014) (“Disagreement between a prisoner and his doctor, or even between two medical professionals, about the proper course of treatment generally is insufficient, by itself, to establish an Eighth Amendment violation.”).

Despite the Court’s misgivings about the complaint, Plaintiff will be afforded an opportunity to amend his pleading. If he chooses to offer an amended complaint, Plaintiff must do so no later than **March 23, 2020**. If he does not do so, this action will be dismissed. Plaintiff should be aware that an amended complaint supersedes the prior complaint and must be complete in itself without reference to the original complaint. *See Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1056–57 (7th Cir. 1998). In *Duda*, the Seventh Circuit emphasized that in such instances, the “prior pleading is in effect withdrawn as to all matters not restated in the amended pleading[.]” *Id.* at 1057 (citation omitted); *see also Pintado v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) (“As a general matter, [a]n amended pleading supersedes the former pleading;

the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.'") (quoting *Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V OLYMPIA VOYAGER*, 463 F.3d 1210, 1215 (11th Cir. 2006)). If an amended complaint is received, it will be screened pursuant to 28 U.S.C. § 1915A.

Accordingly,

**IT IS ORDERED** that Plaintiff's motion for leave to proceed without prepayment of the filing fee (*in forma pauperis*) (Docket #2) be and the same is hereby **GRANTED**;

**IT IS FURTHER ORDERED** that on or before **March 23, 2020**, Plaintiff shall file an amended pleading or this action will be dismissed;

**IT IS FURTHER ORDERED** that the agency having custody of Plaintiff shall collect from his institution trust account the balance of the filing fee, \$323.35, by collecting monthly payments from Plaintiff's prison trust account in an amount equal to 20% of the preceding month's income credited to Plaintiff's trust account and forwarding payments to the Clerk of Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). The payments shall be clearly identified by the case name and number assigned to this action. If Plaintiff is transferred to another institution, county, state, or federal, the transferring institution shall forward a copy of this Order along with Plaintiff's remaining balance to the receiving institution;

**IT IS FURTHER ORDERED** that a copy of this order be sent to the officer in charge of the agency where Plaintiff is confined; and

**IT IS FURTHER ORDERED** that Plaintiff shall submit all correspondence and legal material to:

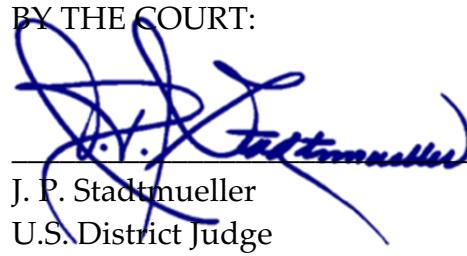
Office of the Clerk  
United States District Court  
Eastern District of Wisconsin  
362 United States Courthouse  
517 E. Wisconsin Avenue  
Milwaukee, Wisconsin 53202

PLEASE DO NOT MAIL ANYTHING DIRECTLY TO THE COURT'S CHAMBERS. It will only delay the processing of the matter.

Plaintiff is further advised that failure to make a timely submission may result in the dismissal of this action for failure to prosecute. In addition, the parties must notify the Clerk of Court of any change of address. Failure to do so could result in orders or other information not being timely delivered, thus affecting the legal rights of the parties.

Dated at Milwaukee, Wisconsin, this 2nd day of March, 2020.

BY THE COURT:



J. P. Stadtmueller  
U.S. District Judge